(1)

90-1004

No. 90-

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

GEORGE C. VOSE,
COMMISSIONER OF CORRECTION,
Petitioner,

v.

INMATES OF THE
SUFFOLK COUNTY JAIL,
Respondents,

Petition for a Writ
of Certiorari to the United
States Court of Appeals
for the First Circuit

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QUESTIONS PRESENTED

1. Are modifications of consent decrees regarding public institutions to be decided under the flexible standard, based upon changed circumstances and the public interest, that has been adopted by several circuits, or must the party seeking modification make a clear showing of grievous wrong evoked by new and unforeseen circumstances, as held by the courts below?

2. Does a federal court have the power, when administering a consent decree, to require state officials to provide jail accommodations that far surpass constitutional requirements?

PARTIES TO THE PROCEEDING

The petitioner is identified in the caption.

The Sheriff of Suffolk County, Massachusetts, is filing a separate petition for certiorari, entitled Robert Rufo v. Inmates of Suffolk County Jail. In addition to the respondents listed in the caption, the following are respondents:

Mayor of Boston;

City Council of Boston;

Deputy Commissioner of Capital Planning and Operations of Massachusetts;

Secretary of Administration and Finance of Massachusetts.

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No. 90-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

GEORGE A. VOSE, JR., Petitioner,

v.

INMATES OF THE SUFFOLK
COUNTY JAIL, et al. Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

George A. Vose, Jr., Commissioner of Correction of Massachusetts, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 2a) is unreported.[1/] The memorandum and order of the District Court (App. 5a-14a) was reported at 734 F.Supp. 561 (D.Mass. 1990).

JURISDICTION

The judgment of the Court of Appeals was entered September 20, 1990. App. 3a-3b. Petitioners invoke the

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1/ Appendix references are to the Appendix in the Petition of Sheriff Robert C. Rufo.

jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

This petition seeks review of a district court's denial of a motion to modify a consent decree to allow more than one inmate to reside in certain cells of a new jail for pretrial detainees in Suffolk County, Massachusetts.

Sheriff Rufo, who is also filing a separate petition for certiorari, moved for modification arguing that there had been a change in law and a change in facts because the number of inmates to be housed at the jail had more than doubled since the consent decree was signed. App. 5a. Population predictions contained in the consent decree, on

which the size of the new jail was based, projected that the population would actually decrease during the relevant period. C.A. App. 189.[2/]

This case began in 1971 as a challenge by inmates of the Suffolk County Jail, also known as the Charles Street Jail, to the conditions of their confinement. Plaintiffs sought relief pursuant to 42 U.S.C. § 1983. Defendants included the sheriff, who operates the jail, M.G.L. c. 127, § 16, and petitioner Commissioner of Correction, who operates state correctional facilities and sets standards for state and county facilities. See M.G.L. c. 124, § 1; c.

2/ References to "C.A. App." are to the Court of Appeals' Appendix. See Supreme Court Rule 19.1.

127, §§ 1A, 1B. The trial court, after receiving evidence, found on June 20, 1973, that conditions in the jail were unconstitutional. App. 40a. The trial court made several interim remedial orders, App. 50a - 54a, but found that the unconstitutional conditions could be eliminated only by construction of a new jail. App. 40a.

By a consent decree dated April 9, 1979, the parties, including petitioner Vose's predecessor as Commissioner of Correction, agreed to construct a new jail. The consent decree was six pages in length, but "incorporated" an architectural program of more than 100 pages describing the jail to be built. App. 15a - 22a (not including architectural program). The consent decree stated that its purpose was to "provide, main-

tain and operate as applicable a suitable and constitutional jail for Suffolk County pretrial detainees." App. 15a.

The 1979 consent decree contains no explicit requirement of -- or even reference to -- housing one inmate per cell of the new jail, although the architectural program assumes one inmate per cell. C.A. App. 236. The architectural program also contained projections of the inmate population to the year 2000, compiled by the Peat, Marwick and Mitchell consulting firm. C.A. App. 188-189. These projections stated that the average inmate population would decrease from 245 in 1979 to 215 in the year 2000. Id. As originally designed, the new jail had a capacity for 309 inmates. App. 7a.

Additional litigation concerning the jail took place in 1984 in the Supreme

Judicial Court of Massachusetts. A new jail had not been constructed by this time, and the sheriff was unable to accept certain prisoners because he did not have sufficient space to house them and still abide by the district court's order to house only one inmate per cell in the old jail. See Attorney General v. Sheriff of Suffolk County, 394 Mass. 624, 477 N.E.2d 361 (1985). As a result of the litigation in the state court, special legislation was passed by the Massachusetts legislature in 1985 to pay for construction of the new jail. Mass. St. 1985, c. 799.

Also in 1985, the inmates, with the assent of all other parties, sought the district court's permission for the construction of a larger facility than had first been planned. The inmates' motion,

apparently based on their best estimate of the need for additional cells, sought an increase to 435 cells. C.A. App. 356. The district court approved a larger jail on the "condition" that "single-cell occupancy is maintained" and on other conditions. C.A. App. 354-364; see App. 8a.

The requirement of one inmate in each cell thus was made explicit for the first time only after the consent decree was signed. The one-inmate-per-cell requirement was first contained in the district court's order of April 11, 1985, pursuant to which the district court permitted a larger jail to be constructed. C.A. App. 363-364. As a result of this order, the size of the jail was increased from 309 to 453. C.A. App. 292.

The new jail, also called the Nashua Street Jail, was completed and occupied

in the spring of 1990. The new jail is a "state of the art" facility, conforming to all applicable standards and regulations and containing the latest technology. C.A. App. 295-297. The jail is constructed in modular units, each of which contains 70-square-foot cells, a spacious day room, a kitchenette, a "quiet room," and facilities for visitation and telephoning. Id.

By 1989, however, the sheriff was aware that the Nashua St. Jail would not be sufficiently large to hold all those persons committed to his custody if only one inmate could could be held in each cell. The average number of inmates committed to the Sheriff's custody has continued to grow since the size of the new jail was established at 453 cells in

1985. App. 10a-11a; C.A. App. 944-945.[3/] In 1985, 326 inmates were in the Sheriff's custody on the average day; in 1987, the number rose to 370; by 1989, the number was 408. In three of the 24 months in 1988 and 1989, the average number of inmates committed to the Sheriff's custody was greater than 453. C.A. App. 944.

The sheriff therefore moved to modify the consent decree to allow more than one inmate in 197 of the 453 cells of

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3/ The record is uncontradicted that, once the 1985 legislation was enacted, additional cells could not have been added without new legislation. C.A. App. 719-721.

the Nashua St. Jail. App. 8a-11a.[4/] Although the 1979 consent decree contained no specific term requiring one inmate per cell, the sheriff sought permission to hold two inmates in certain cells by means of a motion to modify the consent decree.

The record is uncontradicted that the reason for this unexpected increase in inmate population is the equally unexpected increase in crime and in the number of arrests in Suffolk County. Both the Boston Police Commissioner and Suffolk County District Attorney filed

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4/ The proposal to house more than one inmate in only 197 cells allows the facility to continue to meet all of the applicable state and American Correctional Association standards except the standard requiring cells holding two inmates to be at least 140 square feet in size. For example, the Sheriff's proposal complies with the standard for total square footage (including day room, etc.) available to each inmate. C.A. App. 680-709.

affidavits stating that the number of arrests had increased unexpectedly in the relevant period of time, coinciding with an increase in the number of serious crimes. C.A. App. 517-522.

Their affidavits also stated that if inmates who had been committed to the Sheriff's custody had to be released for lack of space, the public safety would be threatened. Id.[5/] Most of those committed to the Sheriff's custody are charged with serious felonies, such as drug sales and crimes of violence. C.A. App. 722.

After taking evidence, the district court denied the motion to modify the

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5/ The record describes the elaborate system, established by state court order, for reviewing and releasing inmates when the maximum number is exceeded. App. 10a-11a. The record is uncontradicted that 10% of the inmates who are transferred to halfway houses under this system escape from custody. C.A. App. 298.

consent decree. App. 5a-14a. The United States Court of Appeals for the First Circuit affirmed the district court in an unpublished, four-sentence decision. App. 1a-4a.

REASONS FOR GRANTING THE WRIT

I. CIRCUITS DISAGREE AS TO THE STANDARD FOR MODIFICATION OF CONSENT DECREES GOVERNING PUBLIC INSTITUTIONS.

There is wide variance among the circuits in the standard for modification of consent decrees governing public institutions. This case illustrates the need for this Court to enunciate a uniform standard for modification in cases involving public institutions and programs.

A. The Circuits Are Split Over The Proper Standard For Modification Based on Changed Circumstances.

In institutional reform litigation, the First Circuit adheres to the standard for modification established for antitrust consent decrees, first stated in United States v. Swift & Co., 286 U.S. 106, 119 (1932). This standard requires "a clear showing of grievous wrong evoked by new and unforeseen conditions . . ."[6/] Other circuits, however, have adopted more flexible standards. The best-known statement of this approach in

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6/ Other circuits have noted the lack of similarity between antitrust cases such as Swift and institutional reform litigation, noting that special factors in institutional litigation limit Swift's relevance. Keith v. Volpe, 784 F.2d 1457, 1460 (9th Cir. 1986); Ruiz v. Lynaugh, 811 F.2d 856, 860-861 (5th Cir. 1987).

cases involving public institutions and programs is probably Chief Judge Friendly's formulation in New York State Assn. for Retarded Children v. Carey, 706 F.2d 956, 969 (2d Cir.), cert. denied 464 U.S. 915 (1983):

> [I]n institutional reform litigation such as this, judicially-imposed remedies must be open to adaptation when unforeseen obstacles present themselves, to improvement when a better understanding of the problem emerges, and to accommodation of a wider constellation of interests than is represented in the adversarial setting of the courtroom.

This standard allows modification more readily than the Swift standard because it requires neither "grievous wrong" nor "unforeseen conditions." Several other circuits have applied similar standards in cases involving the modification of consent decrees in institutional litigation. See, e.g., Philadelphia Welfare Rights Org. v. Shapp, 602 F.2d 1114 (3d Cir. 1979) cert. denied 444

U.S. 1026 (1980); Ruiz v. Lynaugh; United States v. City of Chicago, 663 F.2d 1354 (7th Cir. 1981)(en banc) (vacating district court's denial of modification); Keith v. Volpe; Newman v. Graddick, 740 F.2d 1513 (11th Cir. 1984) (vacating district court's denial of modification). These courts explicitly have limited the application of Swift in cases involving public institutions. Swift's "standard is inappropriate in institutional reform litigation for 'the unique nature and demands of institutional reform litigation necessitate a more flexible approach to modification.'" Plyler v. Evatt, 846 F.2d 208 (4th Cir.), cert. denied 488 U.S. 897 (1988), quoting Ruiz, 811 F.2d at 861. See also Newman, 740 F.2d at 1520 (citing Swift as one among five standards for modification).

As generally applied by the courts that have adopted the standard for public institutions, modification is appropriate when a term of the original consent decree no longer functions equitably or efficiently because of a change in circumstances, the modification furthers the underlying purpose of the original decree, Heath v. DeCourcey, 888 F.2d 1105 (6th Cir. 1989), the party seeking modification has acted in good faith, Shapp, 602 F.2d at 970-971, and the public interest is served, Duran v. Elrod, 760 F.2d 756, 759 (7th Cir. 1985). This standard preserves the essence of the original consent decree, while adopting it to changed circumstances, new demands on public officials and public resources, and to the public interest. This standard relates directly to the

circumstances of public cases, which are different than in cases involving only private parties. See Ruiz, 811 F.2d at 860-861; Keith, 784 F.2d at 1460.

In cases factually similar to this one, two other circuits have modified consent decrees to dispense with requirements that inmates be held one-per-cell. When unexpected increases in inmate populations made it impossible for prison administrators to obey a consent decree requiring one inmate per cell, the Fourth Circuit vacated the district court's denial of modification of a consent decree and remanded with instructions to modify the consent decree to allow two inmates in some cells. Plyler. In similar circumstances, the Seventh Circuit reversed the district court and temporarily modified a consent decree

requiring one inmate per cell, finding that enforcing the requirement would have an impact on public safety, because dangerous pretrial detainees would have to be released to satisfy the one-inmate-per-cell requirement. Duran.[7/]

B. The Circuits Are Split Over The Proper Standard Of Modification Based on Change of Law.

The First Circuit's standard for modification based on change of law is stricter than other circuits'

7/ In the most-cited case upholding the denial of modification to allow more than one inmate per cell, Twelve John Does v. District of Columbia, 861 F.2d 295 (D.C. Cir. 1988), the lower court provided reasons why higher inmate populations were not unanticipated. In this case, in contrast, the district court merely concluded, without citation to any evidence and without reference to the population projections in the consent decree, that inmate population increases could have been foreseen.

standards. The First Circuit requires that a later case must "directly overrule" prior law in order to justify modification of a consent decree. App. 10a, citing Coalition of Black Leadership v. Cianci, 570 F.2d 12, 16 (1st Cir. 1978). In contrast, other Courts of Appeal have held that there need be no explicit overruling, and that changes in underlying decisional law constitute a basis for modification of consent decrees. Newman, 740 F.2d at 1520-1521; Nelson v. Collins, 659 F.2d 420, 425-429 (4th Cir. 1981) (en banc).

In this case, the sheriff and petitioner Vose argued that changes in the law after the consent decree was signed justified modification. In the period after the parties signed the consent decrees, this Court ruled several times in

cases involving challenges to the constitutionality of conditions of confinement, changing and clarifying existing law. See, e.g., Bell v. Wolfish, 441 U.S. 520 (1979); Rhodes v. Chapman, 452 U.S. 337 (1981).

The district court found that these decisions did not constitute a change in law sufficient to justify modification. The Eleventh and Fourth Circuits, by contrast, found that exactly these cases constitute a sufficient change in law to support modification of consent decrees in similar situations. Newman v. Graddick, 740 F.2d at 1521; Nelson v. Collins, 659 F.2d at 424-429. In both Newman and Nelson, Courts of Appeal vacated district courts' denials of modifications and remanded with instructions to modify the consent decrees to conform to the changed law.

II. THE COURT SHOULD GRANT THE PETITION BECAUSE OF THE NATIONAL IMPORTANCE OF THE PUBLIC ISSUES IMPLICATED IN MODIFYING FEDERAL CONSENT DECREES.

This Court should articulate the rule governing the modification of consent decrees pertaining to public institutions because of the great importance of these consent decrees and the frequency with which questions about modifications arise. In recent decades, litigation about jails and prisons, mental health facilities, welfare and social programs and the like has increased. These cases often result in consent decrees.

Especially in cases involving public facilities and programs, it is important to provide flexibility to account for changed circumstances. The district court's chief reason for denying modification, that the inmates ought to

have the benefit of their bargain, carries far less weight in a case involving a public institution such as a jail; the interests on the other side, including public officials' duty to act, competing demands on scarce public resources, and public safety interests, strongly weigh on the side of flexibility. See Duran, 760 F.2d at 759; Jost, From Swift to Stotts and Beyond: Modifications of Injunctions in the Federal Courts, 64 Tex. L. Rev. 1101, 1149 (1986); Note, The Modification of Consent Decrees in Institutional Reform Litigation, 99 Harv. L. Rev. 1020, 1032-1039 (1986).

If the First Circuit's rigid standard for modification is undisturbed, consent decrees involving public institutions will become virtually ironclad arrangements with the status of law,

whatever may be the contrary wishes of later elected executive officials or legislators. Such consent decrees may be "a shortcut around political constraints." Note, Federalism and Federal Consent Decrees Against State Government Entities, 88 Col. L. Rev. 1796, 1806 (1988). See also Rabkin and Devins, Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements with the Federal Government, 40 Stan. L. Rev. 203, 269-276 (1987); Note, 99 Harv. L. Rev. 1024, 1035. These considerations motivated the Justice Department's strict controls on consent decrees that bind and constrain later executive and legislative officials. See Jost, The Attorney General's Policy on Consent Decrees and

Settlement Agreements, 39 Admin. L. Rev. 101 (1987).

Because so many cases involving governmental institutions and programs are resolved by consent decrees which are permanent or long-lived, questions of modification of the decrees will continue to proliferate. See cases cited at Jost, 64 Tex. L. Rev. 1101; Note, 99 Harv. L. Rev. 1020 and Note, 88 Col. L. Rev. 1796 (1988). The only decisions of this Court addressing modifications of consent decrees involve quite different circumstances, because they arise from cases involving antitrust consent decrees in which very different interests are at stake and different pressures affect the litigation. See Ruiz, 811 F.2d at 860-861. In order for governments to understand the risks and obligations

they face when they enter into consent decrees, this Court should state a uniform, flexible standard governing modification of consent decrees in cases of public institutions and programs.

III. THE CIRCUITS ARE DIVIDED ON THE QUESTION OF DISTRICT COURTS' POWERS TO ENFORCE CONSENT DECREES ABSENT CONSTITUTIONAL VIOLATIONS.

This case also presents the important and recurring question of a federal court's power to enforce a consent decree absent any constitutional violation warranting the remedy. This Court should hold that federal courts have no such power when, as in this case, there is no continuing or threatened violation of a federal right.

In this case, the district court has ordered, purportedly based on the consent decree, state officials to hold

no more than one inmate in each cell of the new jail, even though it now is clear that inmates have no constitutional right to live one-per-cell. Rhodes v. Chapman; Bell v. Wolfish.[8/] The district court held that the consent decree vested it with the power to enforce the one-inmate-per-cell rule, even though the rule is not constitutionally required.[9/]

8/ Since the consent decree was signed in 1979, the law regarding federal courts' power also has been clarified substantially. See, e.g., Pennhurst State School and Hosp. v Halderman, 465 U.S. 89 (1984). It is unlikely that the defendants would have entered into the consent decree in this case had Pennhurst and similar cases been decided at the time.

9/ The district court's decision effectively means that all pretrial detainees in Suffolk County must be held one per cell in perpetuity.

Other Courts of Appeal have held that federal courts may not enforce consent decrees that go beyond the relief that the courts could award after trial. "[A] federal court's remedial jurisdiction is coextensive with and no greater than the scope of the right being protected." Lelsz v. Kavanagh, 807 F.2d 1243, 1253 n. 11 (5th Cir.), cert. dis. 483 U.S. 1057 (1987) (holding that federal court was without jurisdiction to enforce consent decree). In Washington v. Penwell, 700 F.2d 570, 574-575 (9th Cir. 1983), the court refused to enforce a consent decree that went beyond the court's inherent powers. In Newman v. Graddick and Nelson v. Collins, as well, courts modified consent decrees to make them coextensive with the court's remedial powers.

Federal courts may act only when there is a violation of a constitutional right or federal law. A remedy under a consent decree should be within the bounds of the underlying federal right. Firefighters Local Union v. Stotts, 467 U.S. 561, 574 (1984); see Note, 88 Col. L. Rev. 1796, 1804 (1988). The Eleventh Amendment bars federal courts from requiring the sheriff, whose office is established by the Massachusetts Constitution, to provide inmates with more than the constitution requires. Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976). Although a federal court may enter a consent decree providing more relief than the court could give after trial, Local No. 93 v. City of Cleveland, 478 U.S. 501, 525 (1986), this Court has not held that a lower court has the power

to enforce against a state the provisions of such a decree that go beyond constitutional requirements.[10/]

With regard to this question as well, states and private parties involved in litigation over state institutions and programs must know the limits of federal courts' authority. To bring certainty and predictability to the law of consent decrees, this Court should decide the limits of federal courts' authority to enforce consent decrees when the consent decrees go beyond what is required by the constitution or federal laws.

10/ This Court frequently has pointed out the importance of federal courts' deference to executive branch officials in the context of prison administration. Turner v. Safley, 482 U.S. 78, 85 (1987); Block v. Rutherford, 468 U.S. 576, 585 (1984).

IV. UNDER THE PROPER STANDARD, THE LOWER COURTS' ORDERS COULD NOT STAND.

The lower courts' orders contain several errors and should be reversed. If the lower courts had appropriately applied the flexible standard discussed in Parts I and II above, they would have allowed the modification.

A. The Judgment Requires Class Members To Be Held in Poorer Facilities.

The lower courts' decisions perversely require some inmates to be transferred to poorer facilities where they are held two-per-cell, rather than allowing them to be held two-per-cell in the more modern and up-to-date Nashua St. Jail. C.A. App. 297. There is no showing in the record that the members of the class prefer this outcome, which appears to be contrary to their best interests.

The record below was clear that, if modification was not allowed, many inmates committed to the custody of the sheriff could not be held in the Nashua St. Jail and would have to be sent to other facilities. C.A. App. 721-722. These transfers are necessary because too many inmates are committed to the sheriff's custody to be held one-per-cell at the Nashua St. Jail.[11/]

The order in this case requires the sheriff to keep only one inmate per cell at the Nashua St. Jail, although most other correctional facilities in the Commonwealth are under no such orders, so that only a

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11/ This case is of particular practical concern to this petitioner, the Commissioner of Correction, because many overflow inmates from the Suffolk County Jail are transferred pursuant to M.G.L. c. 276, § 52A, to state institutions under his control that already hold inmates in excess of their capacity.

few facilities in the Commonwealth are required to comply with the stringent standards placed upon the sheriff. C.A. App. 423-488. The record is clear that those inmates transferred to other facilities are nearly always held two-per-cell, occasionally three-per-cell, in facilities that are uniformly older and contain smaller cells and fewer amenities than the Nashua St. Jail. Id. All of those transferred are held outside Suffolk County, presumably further from their families and attorneys. Some are held more than 100 miles from Boston.

If the lower courts had correctly applied the flexible standard for modification, they would have taken into account the impact of the order on these class members and should have allowed the motion to modify. By allowing the modification, the courts would have

permitted the sheriff to hold these inmates two-per-cell at the newer, more desirable Nashua St. Jail and would have obviated the need for the sheriff to spend nearly $1 million annually to transport and house the inmates in other facilities. C.A. App. 723-724.

B. The Lower Courts' Decisions Undermine Public Safety.

Because the lower courts' orders lead to the release of inmates who have been found by competent courts to be at risk of flight, M.G.L. c. 276, § 58, they undermine public safety. See also C.A. App. 517-522.

There is no dispute that the lower courts' orders have led to the regular release of inmates who have been determined to be at risk of flight to halfway-house programs from which ten percent escape. C.A. App. 298. The

record is uncontradicted that they are a threat to public safety if released. The lower courts' actions continue to leave open the door for the direct release of persons committed to the sheriff's custody when there is no room at the jail and when the sheriff is unable to effectuate or afford transfers to other facilities or to halfway houses.

The lower courts' orders also should be reversed because they fail to adequately protect public safety. See Duran v. Elrod, 760 F.2d at 760-761.

C. This Case Shows the Need For a Flexible Standard.

This case illustrates the need for this Court to set forth a flexible standard of modification and the difficulties with the rigid approach

applied by the Court of Appeals below. Grounds for modification exist because the parties' agreed projections of inmate population, contained in the consent decree itself, proved very optimistic. While the consent decree projected that the average number of inmates would fall from 245 in 1979 to 215 in 1999, in fact the current number now exceeds 500. The record is uncontradicted that this increase is caused by an increase in crime, which the parties could not have predicted. There is no reason that the sheriff and the public should bear the entire burden of this mistake; rather, the consent decree should be modified.

Applying a flexible standard for modification, which would permit the weighing of these burdens in light of

growing inmate population, would result in modification in this case.[12/] There appears to be no question that the inmates would continue to reside in constitutionally-sufficient accommodations if the modification sought by the sheriff is granted.

12/ This argument is similar to the argument of the United States in Board of Education of Oklahoma City v. Dowell, No. 89-1080.

CONCLUSION

For the reasons stated in this petition, this Court should grant the petitions for a writ of certiorari to the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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